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November 24, 2003

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: CS Docket No. 98-120

Dear Ms. Dortch:

In a paper submitted to the Commission in the above-referenced proceeding on July 9, 2002, Harvard Law School Professor Laurence H. Tribe argued that the Commission was correct when it decided, in January 2001, to interpret "primary video" to mean only a single video programming stream. According to Professor Tribe, "[t]he Commission should avoid a broad interpretation of the "primary video" carriage obligation because of the substantial First Amendment, Fifth Amendment, and separation of powers questions that a broad interpretation would raise."

Now that the Commission is preparing to address petitions for reconsideration of its "primary video" decision, Professor Tribe has prepared a second paper, attached to this letter, which reviews his constitutional arguments and replies to arguments made by several broadcast organizations in response to his initial paper. The principal points made by Professor Tribe are as follows:

- Even the broadcast organizations acknowledge the constitutional "avoidance principle," which requires that "statutes should be interpreted to avoid serious constitutional questions." They wrongly contend, however, that there is "no *serious* constitutional issue" raised by requiring carriage of *multiple* streams of programming and other material included in a broadcaster's digital signal.

- The broadcast organizations contend that the constitutional issues raised by Professor Tribe were resolved by the Supreme Court in the *Turner* cases, which upheld the requirement to carry broadcasters' analog signals. But, as Professor Tribe shows, carriage of multiple streams of a single broadcaster's programming is unlikely to survive constitutional scrutiny under the same test that the Supreme Court applied in upholding analog must carry.

- The First Amendment question is not, as the broadcast organizations suggest, whether the bandwidth required to carry broadcasters' multiple digital streams is no more than the bandwidth required to carry a single analog channel: "The salient point," according to Professor Tribe, "is that any multicasting regime cannot satisfy intermediate First Amendment review if broadcasters are afforded more rights on cable systems than are necessary in order to achieve the congressional aims of the 1992 Cable Act."

- As Professor Tribe showed in his initial paper, the governmental interests, set forth in the statute, that justified the analog must carry rules in *Turner – i.e.*, "preserving the benefits of free, over-the-air local broadcast television" and "promoting the widespread dissemination of information from a multiplicity of sources" – would not be meaningfully advanced by a multicast carriage requirement:

  - "The first interest . . . concerned the risk that a broadcast station would not be carried at all on a cable system. That risk is fully addressed by existing must-carry rules, which ensure that the single broadcast channel traditionally received by over-the-air viewers will continue to be available on cable systems."

  - "The second interest – promoting a 'multiplicity of sources' – is not served by awarding mandatory carriage rights to existing broadcasters for additional channels of programming. In fact, by burdening independent programmers, a multicast carriage rule would disserve the supposed interest in encouraging a 'multiplicity of sources.'"

- In response, the broadcast organizations seek to justify carriage of multiple streams of programming on grounds that were never set forth by Congress or approved by the Supreme Court – *i.e.*, that a multicast carriage requirement would encourage broadcasters to develop additional channels of standard definition programming, and would simultaneously hasten the digital transition. But, as Professor Tribe points out, "[w]ithout any support from the 1992 Act, a multicast carriage rule would lack a clear congressional mandate and would face insurmountable constitutional hurdles." And, in any event, these new justifications "are inconsistent, speculative, and utterly unsupported by any evidence."

  - In contrast to the voluminous record compiled in the *Turner* case, "[t]here is no evidence that multicast programming would actually be produced; that cable operators would refuse to carry it; and that as a result television stations would either deteriorate to a substantial degree or fail altogether."

  - The broadcast organizations' claim that a multicast carriage rule would promote the digital transition is, according to Professor Tribe, "even more far-fetched": "There is no reason to think that requiring cable operators to carry broadcasters' multicast standard definition programming would somehow encourage the

purchase of digital television sets or the use of digital set-top boxes by cable subscribers. In fact, by displacing cable program networks that cable operators would otherwise choose to carry, mandatory carriage of broadcasters' multicast digital channels is likely to make digital programming less, not more, attractive to cable subscribers."

- In addition to raising serious constitutional issues under the First Amendment, a multicasting carriage requirement would also raise serious Fifth Amendment and "separation of powers" issues.

  - The Fifth Amendment prohibits the taking of private property by the government without "just compensation." By granting a broadcaster exclusive use of a portion of a cable system indefinitely, a multicast carriage requirement would result in a "permanent physical occupation" of that property – the essence of a *per se* "taking" under Fifth Amendment law. And the must carry statute not only does not provide for "just compensation" – it prohibits payment by broadcasters.

  - This is true of the current analog must carry requirements, as well – but there is an important difference: Congress unambiguously mandated the carriage of broadcasters' single analog channels. But Congress did not clearly and specifically mandate the carriage of multicast digital channels. The Commission can construe "primary video" in a way that avoids the Fifth Amendment problem – and it is required by the "avoidance principle" to do so.

  - Moreover, only Congress has the power to authorize takings and other governmental actions that, because they are otherwise uncompensated, require Tucker Act compensation by the government. The implementation of such a taking by an administrative agency or the Executive Branch in the absence of such Congressional authorization would raise serious separation-of-powers issues. Therefore, agencies are required to avoid construing a statute in a way that results in an uncompensated taking unless the statute unambiguously compels such a construction.

If there are any questions concerning this matter, please contact the undersigned.

Respectfully submitted,

Daniel L. Brenner
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Attachment